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ONLINE MUSIC PIRACY: CAN AMERICAN SOLUTIONS BE EXPORTED TO THE PEOPLE'S REPUBLIC OF CHINA TO PROTECT AMERICAN MUSIC?

Jolene Lau Marshall[†]

Abstract: Online music piracy is a major problem in the United States and a growing problem in the People's Republic of China ("PRC"). Despite awareness of the roots of the problem, the responses of the American government and recording industry have enjoyed only mixed success. The most effective ways of combating online music piracy have been the legal pursuit of individual copyright infringers and the emergence of fee-based download services. In light of the differences in social background, laws, enforcement structure, and cultural beliefs between the United States and the PRC, simply transplanting American responses to online music piracy to the PRC will not be effective. In order to truly prevent the problem from reaching significant proportions in the PRC, the American recording industry and the Chinese government must make copyright protection desirable in Chinese culture. Only by creating an internal demand for copyright can the American recording industry protect itself in the PRC.

I. INTRODUCTION

Copyright infringement is a significant problem around the world. Commercial piracy¹ of physical media accounts for approximately US\$ 4.5 billion in illegal sales world-wide; a staggering number which does not include the value of transactions conducted over the Internet.² Online piracy is the newest enemy in the battle to preserve copyright protection. With the advent of the MP3³ data storage format and the proliferation of high-speed Internet access, the transmission of music files is convenient and easy. Entire albums can be downloaded in a matter of minutes. This ability to transmit high-quality music files quickly and with little difficulty poses a

[†] The author would like to thank Professor Robert Gomulkiewicz for his help during the writing of this Comment, and the *Pacific Rim Law & Policy Journal* staff for editorial support. Any errors or omissions are the author's own.

¹ Piracy is "deliberate infringement of copyright on a commercial scale," as defined by the International Federation of the Phonographic Industry ("IFPI"). IFPI, WHAT IS PIRACY?, at http://www.ifpi.org/site-content/antipiracy/what_is_piracy.html (last visited Jan. 14, 2005). The IFPI is an international organization representing the recording industry. It has members in seventy-five countries and is affiliated with industry organizations in forty-eight countries. IFPI, WHAT IS IFPI?, at <http://www.ifpi.org/site-content/about/mission.html> (last visited Jan. 14, 2005).

² IFPI, THE RECORDING INDUSTRY: COMMERCIAL PIRACY REPORT 2004, at 2, available at <http://www.ifpi.org/site-content/library/piracy2004.pdf> (last visited Jan. 14, 2005).

³ MP3 stands for MPEG-1 Layer 3 and is a compression standard that creates small audio files with high-quality sound. See David Kushner, *The Beat Goes on Line, and Sometimes It's Legal*, N.Y. TIMES, June 17, 1999, at G1.

danger to the music industry worldwide.⁴

The United States is currently struggling to eliminate online music piracy. The Recording Industry Association of America ("RIAA")⁵ recently began suing individual Internet users engaged in illegal downloading of copyrighted music.⁶ Several years ago, the RIAA was successful in its effort to shut down Napster, an online service that enabled users to share music files free of charge.⁷ In addition to pursuing individual music consumers, the music industry is resorting to other tactics in the fight against Internet piracy: educating the public,⁸ incorporating technology that prevents copying,⁹ and appealing to the U.S. government to strengthen copyright protection laws.¹⁰

The People's Republic of China ("PRC") will likely be the next to face the problem of online music piracy due to the PRC's growing Internet use, societal rejection of copyrights, and lax enforcement of copyright laws. Chinese Internet service providers are already hosting infringing websites accessed by users around the world.¹¹ Piracy levels in the PRC exceed ninety percent of music sales, and in 2002, estimated losses to the American copyright industry surpassed US\$ 1.8 billion.¹² The lack of intellectual property rights protection in the PRC has long been challenged by the United States,¹³ but because the Chinese copyright system reflects differing

⁴ See *id.*

⁵ The RIAA is a trade group that represents the U.S. recording industry. Its membership is made up of record companies who "create, manufacture and/or distribute approximately 90 percent of all legitimate sound recordings produced and sold in the U.S." The mission of the RIAA is to "foster a business and legal climate that supports and promotes [its] members' creative and financial vitality." RIAA, ABOUT US, at <http://www.riaa.com/about/default.asp> (last visited Jan. 14, 2005).

⁶ See Press Release, RIAA, Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online (Sept. 8, 2003), available at <http://www.riaa.com/news/newsletter/090803.asp> (last visited Jan. 14, 2005) [hereinafter *RIAA Press Release*].

⁷ See RIAA, NAPSTER CASE, at <http://www.riaa.com/news/filings/napster.asp> (last visited Jan. 14, 2005).

⁸ See Press Release, RIAA, RIAA Brings New Round of Lawsuits Against Illegal File Sharers (Mar. 23, 2004), at <http://www.riaa.com/news/newsletter/032304.asp> (last visited Jan. 14, 2005).

⁹ ELECTRONIC FRONTIER FOUNDATION, UNINTENDED CONSEQUENCES: FIVE YEARS UNDER THE DMCA 7, Sept. 24, 2003, at http://www.eff.org/IP/DMCA/unintended_consequences.pdf (last visited Jan. 14, 2005) [hereinafter *Unintended Consequences*].

¹⁰ See Press Release, RIAA, RIAA Asks FCC to Adopt Protections Against Digital Radio Piracy, (June 16, 2004), at <http://www.riaa.com/news/newsletter/061604.asp> (last visited Jan. 14, 2005).

¹¹ See Press Release, RIAA, Listen4Ever to Pirated Music on Chinese Web Site? Not Anymore (Aug. 21, 2002), at <http://www.riaa.com/news/newsletter/082102.asp> (last visited Jan. 14, 2005).

¹² Letter from Eric H. Smith, President, International Intellectual Property Alliance ("IIPA"), to Gloria Blue, Executive Secretary of Trade Policy Staff Committee, Office of the United States Trade Representative 5 (Sept. 10, 2003), http://www.iipa.com/pdf/2003_Sep10_WTO_China.pdf (last visited Jan. 14, 2005).

¹³ See Warren H. Maruyama, *U.S.-China IPR Negotiations: Trade, Intellectual Property, and the Rule of Law in a Global Economy*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 165 (Mark

societal needs, concepts of rights, and culture, it is unlikely that it will gain U.S. approval in the near future.

Online piracy in the PRC has not yet reached substantial proportions due to lack of Internet access,¹⁴ but the problem will likely reach serious levels within the next few years.¹⁵ The successful methods used in the United States to prevent online music piracy cannot simply be transported to the PRC. Already, the United States has pressured the PRC to adopt Western-style copyright laws and has met with disappointing results. To prevent online piracy in the PRC, responses need to reflect Chinese culture.

This Comment argues that American responses to online piracy in the PRC will not be effective because of the numerous differences in the two nations' copyright systems. Part II compares the U.S. and Chinese copyright systems. Part III explores the responses made to the online piracy problem in the United States, and gauges their efficacy. Part IV speculates on the effects of U.S. responses on the copyright culture of the PRC. Part V asserts that success in preventing online piracy will only come from culturally-sensitive responses, and suggests possible solutions.

II. THE COPYRIGHT SYSTEMS OF THE UNITED STATES AND PRC DIVERGE IN MANY RESPECTS

To prevent online piracy in the PRC, an understanding of the Chinese copyright system is necessary. A comparison of the Chinese system with its American counterpart reveals many characteristics of the Chinese copyright system that make enforcement difficult. Such areas include a differing underlying philosophy, broad exceptions to liability, high thresholds for criminal prosecution, and a complicated enforcement structure. This comparison will also help in theorizing the effectiveness of American responses in the PRC.

A. *The Theoretical Underpinnings of Copyright are More Individually-Focused in the United States than in the PRC*

The theories underlying the copyright systems in the United States and the PRC differ dramatically. In the United States, the focus is upon the

A. Cohen et al. eds., 1999) (stating that the U.S. and the PRC have engaged in at least "three heated confrontations over inadequate Chinese protection of intellectual property rights").

¹⁴ See *Chinese Courts Act on Internet Piracy as Asian Online Music Market Grows*, MUSIC & COPYRIGHT, March 29, 2000, LEXIS, Nexis Library, All News File.

¹⁵ See *Chinese, Western Music Companies Team Against Online Piracy*, CHINAONLINE, July 20, 2000, LEXIS, Nexis Library, All News File.

creator of the copyrighted works,¹⁶ while in the PRC, the interests of society predominate.¹⁷ The intellectual property laws and attitudes of each nation reflect these significantly different views.

1. *Philosophies of Copyright in the United States*

In the United States, copyright protection is based on two Western philosophies: the natural rights doctrine and the economic rights doctrine.¹⁸ Under the natural rights doctrine, authors are entitled to reap the fruits of their labor¹⁹ and to protect the integrity of their creations.²⁰ "The power over one's writing is a 'sacred' liberty that cannot be limited for the public good."²¹ This doctrine also gives copyright owners an inherent property interest in their mental "labor" and the manifestations of that "labor."²²

According to the economic rights doctrine, the proprietary rights permitted by the copyright system are necessary to assure contributors a fair return for their efforts.²³ This requires a balance between the public's interest in accessing works and the right of the creator in receiving the economic rewards of producing works.²⁴ Under this theory, copyright is necessary to prevent creators of works from turning their attention to more financially lucrative behavior.²⁵ Economic rights promote progress and innovation by rewarding copyright holders.²⁶

2. *Philosophies of Copyright in the PRC*

The Chinese concept of copyright is shaped by Confucianism, recent legal history, and socialism. Confucianism is basic to Chinese philosophy and social conduct, and conflicts with the idea of rule of law.²⁷ Confucianism asserts that people should live in accordance with *li*, the

¹⁶ See discussion *infra* Part II.A.1.

¹⁷ See discussion *infra* Part II.A.2.

¹⁸ See Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1293 (2003).

¹⁹ See Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 523-24 (1990).

²⁰ See Garon, *supra* note 18, at 1306.

²¹ *Id.*

²² *Id.*; Yen, *supra* note 19, at 536-37.

²³ Garon, *supra* note 18, at 1306.

²⁴ *Id.* at 1307.

²⁵ *Id.*

²⁶ See *id.* at 1310-16.

²⁷ SANQIANG QU, COPYRIGHT IN CHINA 5-6 (2002).

accepted modes of behavior,²⁸ and are not governed by *fa*, the rule of law.²⁹ The law is supposed to prevent threats to the natural order instead of providing criteria for distinguishing rights and wrongs.³⁰ Confucianism advocates the dominance of public good over individual desires.³¹

Confucianism is also contrary to the idea of intellectual property. It asserts that the past is important because it assists in moral development and provides a yardstick for measuring the relationships that make up society.³² Because of these important functions, "materials and information about the past [must] be put in the public domain for people to borrow or to transmit to younger generations."³³ Intellectual property rights are condemned for monopolizing necessary information and preventing general dissemination.³⁴

During the Cultural Revolution, copyright protection did not exist in the PRC.³⁵ Personal legal rights were expressions of self-interest. People did not claim their rights,³⁶ and were unwilling to acknowledge their role in inventive activities.³⁷ After the end of the Cultural Revolution, the PRC began to rebuild its legal system.³⁸ While the PRC created laws protecting intellectual property³⁹ and agreed to maintain certain levels of protection, intellectual property was vulnerable because traditional beliefs about it had not changed.⁴⁰ Furthermore, developed countries and developing countries, such as the PRC, viewed copyright protection differently. Developed countries saw copyright protection as necessary to ensure compensation for the author and to establish economic incentives for future innovation,⁴¹ while developing countries viewed copyright as a way for Western

²⁸ DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA: EXEMPLIFIED BY 190 CH'ING DYNASTY CASES* 19 (1967).

²⁹ Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1, 33 (2001); Robb M. LaKritz, Comment, *Taming a 5,000 Year Old Dragon: Toward a Theory of Legal Development in Post-Mao China*, 11 EMORY INT'L L. REV. 237, 243 (1997).

³⁰ EDWARD W. PLOMAN & L. CLARK HAMILTON, *COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 142 (1980).

³¹ See Glenn R. Butters, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1108 (1996).

³² WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 20 (1995).

³³ Yu, *supra* note 29, at 17.

³⁴ *Id.*

³⁵ QU, *supra* note 27, at 38.

³⁶ Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 362 (2003).

³⁷ ALFORD, *supra* note 32, at 64.

³⁸ *Id.* at 65.

³⁹ See Xiangweb Wu, *Intellectual Property Rights Protection in China and China's Efforts to Join WTO in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE*, *supra* note 13, at 131.

⁴⁰ QU, *supra* note 27, at 39.

⁴¹ *Id.* at 40.

companies to charge excessively high prices and limit the modernization of their societies.⁴²

More recently, the PRC incorporated socialism into its copyright system.⁴³ The fundamental principles that underlie socialist copyright differ greatly from the Western understanding of copyright. Property does not belong to private owners, but instead to the government and the people.⁴⁴ Owning property is wrong. It is worse than stealing property that belongs to someone else.⁴⁵ Cultural policies rather than individual rights drive copyright protection.⁴⁶ Also, socialist copyright laws allow an extensive public use of copyrighted works.⁴⁷

Chinese copyright will not conform to Western ideals because the philosophical bases for copyright are different. These societal beliefs cannot be easily changed. Only responses consistent with these beliefs will be effective in preventing online piracy in the PRC.

B. The Copyright Laws and Related Treaties Are More Thorough in the United States than in the PRC

The United States and the PRC have generally similar copyright laws. Both are signatories to many of the same international copyright treaties.⁴⁸ U.S. copyright law reflects the Western notion that copyright should focus on the rights of individuals.⁴⁹ It provides a variety of rights and protections to individual creators of copyrighted works.⁵⁰ The Chinese copyright law

⁴² *Id.*

⁴³ Article 1 of the Copyright Law specifically states that the law aims "to encourage creation and spreading of works conducive to construction of socialist spiritual civilization and material civilization, and to facilitate development and flourishing of socialist culture and science undertaking." Zhonghua Renmin Gongheguo Zhuzuoquanfa [Copyright Law of the People's Republic of China], Fagui Huibian, art. 1, 1990 [hereinafter PRC Copyright Law]. English translation available at http://www.isinolaw.com/jsp/law/LAW_Chapters.jsp?CatID=283&LangID=0&StatutesID=2002621 (last visited Jan. 14, 2005). Article 4 says that the exercise of copyright protection cannot harm the public interest. PRC Copyright Law, art. 4.

⁴⁴ Yu, *supra* note 29, at 21.

⁴⁵ Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and its Effects Upon International Trade: A Comparison*, 46 BUFF. L. REV. 1, 37-38 (1998).

⁴⁶ *Id.* at 58; Yu, *supra* note 29, at 31.

⁴⁷ QU, *supra* note 27, at 58. See also Dr. Silke von Lewinski, *Copyright in Central and Eastern Europe: An Intellectual Property Metamorphosis*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 39, 42 (1997) (stating that socialism restricts copyright protection by providing free uses for the benefit of the public).

⁴⁸ See discussion *infra* Parts II.B.1-2.

⁴⁹ See discussion *infra* Part II.B.1.

⁵⁰ See *infra* notes 58-59 and accompanying text.

mirrors these Western beliefs due to international pressure.⁵¹ Thus, the PRC has the basic laws required for adequate copyright protection, but these laws conflict with Chinese societal beliefs and are thus ineffective.

1. *Copyright-Related Law in the United States*

The Copyright Act of 1976 ("Copyright Act") is the basis of current U.S. copyright law. It provides protection for "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."⁵² The rights granted to these works include the rights to reproduce, to prepare derivative works, and to distribute copies.⁵³ These rights are limited by exceptions⁵⁴ such as reproduction by libraries and, most importantly, the fair use exception.⁵⁵

The U.S. Congress expanded copyright protection in 1998 with the passage of the U.S. Digital Millennium Copyright Act ("DMCA").⁵⁶ The DMCA gave the force of law to two treaties related to copyright protection in the digital age.⁵⁷ The World Intellectual Property Organization ("WIPO")⁵⁸ Copyright Treaty and Performances and Phonograms Treaty⁵⁹ (collectively known as the WIPO Internet Treaties)⁶⁰ were designed to update and improve existing copyright protection.⁶¹ The treaties state that the right of reproduction applies in the digital environment,⁶² and the agreed statements provide that copyright owners are entitled to "control whether

⁵¹ See Daniel Behrendt, *Computer Software Copyright Law in the People's Republic of China*, 2 U.C. DAVIS J. INT'L L. & POL'Y 1, 10-11 (1996).

⁵² 17 U.S.C. § 102 (2004).

⁵³ U.S. Copyright Office, *Circular 1: Copyright Basics: What Works are Protected?*, Sept. 2000, available at <http://www.copyright.gov/circs/circ1.html> (last visited Jan. 14, 2005).

⁵⁴ 17 U.S.C. §§ 107-120.

⁵⁵ See *infra* note 94 and accompanying text.

⁵⁶ See generally U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY, Dec. 1998, at <http://www.copyright.gov/legislation/dmca.pdf> (last visited Jan. 14, 2005) (stating that the DMCA implements two treaties and addresses other copyright issues).

⁵⁷ *Id.*

⁵⁸ WIPO is a specialized United Nations organization dedicated to promoting the use and protection of intellectual property. WIPO, ABOUT WIPO, at <http://www.wipo.int/about-wipo/en/overview.html> (last visited Jan. 14, 2005).

⁵⁹ WIPO, ABOUT WIPO: GENERAL INFORMATION, at http://www.wipo.int/about-wipo/en/gib.htm#P61_9104 (last visited Jan. 14, 2005).

⁶⁰ WIPO, THE WIPO INTERNET TREATIES, at http://www.wipo.int/freepublications/en/e-commerce/450/wipo_pub_1450in.pdf (last visited Jan. 14, 2005) [hereinafter WIPO INTERNET TREATIES].

⁶¹ *Id.*

⁶² *Agreed Statements Concerning the WIPO Copyright Treaty*, Concerning Article 1(4), WIPO Doc. CRNR/DC/96 (Dec. 20, 1996); *Agreed Statements Concerning the WIPO Performances and Phonograms Treaty*, Concerning Articles 7, 11, and 16, WIPO Doc. CRNR/DC/97 (Dec. 20, 1996).

and how their creations are made available online.”⁶³ The WIPO Internet Treaties also require member states to enact protective measures⁶⁴ and provide national treatment⁶⁵ to works originating from other member nations.⁶⁶

In addition to the WIPO Internet Treaties, the United States is also a member of the Berne Convention.⁶⁷ The Berne Convention is the principal international treaty allowing for recognition of copyright across borders.⁶⁸ The most significant feature of the Berne Convention is that it requires national treatment for all signatories.⁶⁹

The last relevant international treaty that binds the United States is the World Trade Organization Agreement on Trade Related Aspects of Intellectual Property (“TRIPS Agreement”).⁷⁰ The TRIPS Agreement is the “most comprehensive multilateral agreement on intellectual property” to date.⁷¹ The TRIPS Agreement requires World Trade Organization (“WTO”)⁷² members to set up standards for required protection, clarifies enforcement procedures, and provides for dispute settlement between member nations.⁷³ It also requires compliance with the Berne Convention, and then clarifies and adds certain points, mostly related to copyright protection for computer programs and databases.⁷⁴ The TRIPS enforcement

⁶³ WIPO INTERNET TREATIES, *supra* note 60. See WIPO Copyright Treaty, Dec. 20, 1996, art. 8, S. Treaty Doc. No. 105-17, 36 I.L.M. 65; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, art. 14, S. Treaty Doc. No. 105-17, 36 I.L.M. 76.

⁶⁴ Member countries must act to prevent circumvention of copyright protection measures and thwart tampering with the integrity of copyright management information, which provides information about the terms of use, etc. WIPO INTERNET TREATIES, *supra* note 60.

⁶⁵ National treatment means that member states must provide the same copyright protection to nationals of other member states as they do for their own nationals. See INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS LAW 16 (Wilhelm Nodemann et al eds. & Gerald Meyer, trans., 1990).

⁶⁶ *Id.*

⁶⁷ WIPO, *Berne Convention for the Protection of Literary and Artistic Works: Contracting Parties*, Sept. 24, 2004, available at <http://www.wipo.int/treaties/en/documents/word/e-berne.doc> (last visited Jan. 14, 2005).

⁶⁸ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.01 (2004); IFPI, *Copyright and Related-Rights Treaties and Laws* (on file with author) [hereinafter *Copyright Treaties and Laws*].

⁶⁹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 6, 1886, art. 3,

25 U.S.T. 1341, 828 U.N.T.S. 221 (amended Sept. 28, 1979).

⁷⁰ WTO, UNDERSTANDING THE WTO: MEMBERS AND OBSERVERS, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 14, 2005).

⁷¹ WTO, OVERVIEW: THE TRIPS AGREEMENT, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Jan. 14, 2005) [hereinafter TRIPS AGREEMENT OVERVIEW].

⁷² “The WTO is the only international organization dealing with global rules of trade between nations.” WTO, THE WTO IN BRIEF, at http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm (last visited Jan. 14, 2005).

⁷³ TRIPS AGREEMENT OVERVIEW, *supra* note 71.

⁷⁴ *Id.*

requirements include a system that “permits effective action against infringement, contains expeditious remedies which constitute a deterrent, is fair and equitable, is not unnecessarily complicated or costly, and does not entail any unreasonable time limits or unwarranted delays.”⁷⁵ The extensive requirements of the TRIPS Agreement make it one of the most important treaties to intellectual property protection.

2. *Copyright-Related Law in the PRC*

The PRC Copyright Law of 1990 seeks to protect copyrights, encourage the creation of works that benefit socialist spiritual and material civilization, and promote the development of a socialist scientific and cultural environment.⁷⁶ To gain accession into the WTO, the PRC amended the Copyright Law to extend the scope of protection and enhance the penalties for infringement.⁷⁷ It also enacted related legislation, including the *Implementation of International Copyright Treaties Provisions*, in which it adopted the Berne Convention.⁷⁸ The PRC has not ratified the WIPO Internet Treaties,⁷⁹ but did consider them when amending the Copyright Law in 2001.⁸⁰

In 1992, the United States and the PRC entered into a bilateral treaty regarding intellectual property rights to avoid a trade war.⁸¹ The Memorandum of Understanding Concerning Protection of Intellectual Property Rights Between the Government of the United States of America and the Government of the People’s Republic of China required the PRC to

⁷⁵ IIPA, WTO TRIPS IMPLEMENTATION, at <http://www.iipa.com/trips.html> (last visited Jan. 14, 2005).

⁷⁶ PRC Copyright Law, art. 1.

⁷⁷ China Internet Information Center, *China Amends Copyright Law*, Nov. 16, 2001 at http://service.china.org.cn/link/wcm/Show_Text?info_id=22246&p_qry=amendments%20and%20to%20and%20the%20and%20copyright%20and%20law (last visited Jan. 14, 2005).

⁷⁸ IP PROTECTION IN CHINA – THE LAW 157 (Clare Speight ed., 2d ed. 1998).

⁷⁹ WIPO, WIPO COPYRIGHT TREATY: CONTRACTING PARTIES, available at <http://www.wipo.int/treaties/en/documents/word/s-wct.doc> (last visited Jan. 14, 2005) [hereinafter *Contracting Parties to Copyright Treaty*]; WIPO, WIPO PERFORMANCES AND PHONOGRAMS TREATY: CONTRACTING PARTIES, available at <http://www.wipo.int/treaties/en/documents/word/s-wpmt.doc> (last visited Jan. 14, 2005) [hereinafter *Contracting Parties to Performances and Phonograms Treaty*].

⁸⁰ XUE HONG & ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY LAW IN THE 21ST CENTURY 37 (2002).

⁸¹ Frustrated with the lack of intellectual property protection, the United States threatened the PRC with trade sanctions under the “Special 301” provisions of the Trade Act of 1974. Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U.L. REV. 131, 142 (2000). The “Special 301” provisions empower the United States Trade Representative to “investigate and negotiate foreign intellectual property protection, and to impose trade sanctions.” Behrendt, *supra* note 51, at 28. In response to the threat, the PRC attempted to impose countersanctions of a like amount. Yu, *supra* at 142.

improve copyright protection.⁸² The PRC had to create special task forces “to perform copyright-related searches, seizures and arrests,”⁸³ as well as join the Geneva Phonograms Convention⁸⁴ and the Berne Convention.⁸⁵

As of September 2004, the only major international copyright agreements that the PRC has not signed are the WIPO Internet Treaties.⁸⁶ While the PRC should ratify those treaties,⁸⁷ doing so will not prevent online music piracy from becoming a problem in the PRC. In light of the ongoing copyright infringement in the PRC,⁸⁸ having laws that meet international standards for copyright protection is not sufficient. So far, pressure to protect copyrights has only come from outside the PRC, but an internal stimulus is necessary to make the laws work.

C. The Theories of Copyright Infringement and the Fair Use Exception Are More Restrictive in the United States than in the PRC

The theories of copyright infringement and the fair use exception to infringement reflect the differing underlying philosophies of the United States and the PRC. In the United States, there are three distinct theories of infringement and limited exceptions to infringement liability.⁸⁹ In the PRC, there are two overlapping types of non-criminal infringement and a wide range of exceptions to liability.⁹⁰ This difference is attributable to the preference for the individual in the United States and the preference for society in the PRC.

1. Copyright Infringement in the United States

There are several theories of copyright infringement under U.S.

⁸² Maruyama, *supra* note 13, at 187-89.

⁸³ QU, *supra* note 27, at 351.

⁸⁴ The Geneva Phonograms Convention requires member states to protect producers of phonograms from the unauthorized reproduction and distribution of their works. *Copyright Treaties and Laws, supra* note 68.

⁸⁵ Yu, *supra* note 81, at 142.

⁸⁶ *Contracting Parties to Copyright Treaty, supra* note 79; *Contracting Parties to Performances and Phonograms Treaty, supra* note 79.

⁸⁷ The PRC should ratify the WIPO Internet Treaties because they specifically address copyright protection for works accessible over the Internet. *See supra* notes 58-66 and accompanying text.

⁸⁸ *See* IIPA, 2004 SPECIAL 301 REPORT: PEOPLE'S REPUBLIC OF CHINA 1, <http://www.iipa.com/rbc/2004/2004SPEC301CHINA.pdf> (last visited Jan. 14, 2005) [hereinafter 2004 SPECIAL 301 REPORT] (explaining that piracy rates remain at over ninety percent across all copyright industries).

⁸⁹ *See infra* notes 91-93 and accompanying text.

⁹⁰ *See infra* notes 96-98 and accompanying text.

copyright law. Direct infringement occurs when a party violates any of the copyright owner's exclusive rights.⁹¹ Contributory infringement takes place when "one, who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."⁹² Vicarious infringement occurs when a party possesses the right and ability to supervise the infringement, and has an obvious and direct financial interest in exploiting the copyrighted material.⁹³

The most significant exception to copyright infringement in the United States is the fair use doctrine. According to the fair use doctrine, use for the purposes of criticism, comment, news reporting, teaching, scholarship, or research do not constitute copyright infringement.⁹⁴ In determining whether or not fair use applies, a court is authorized to consider the purpose of the use, the effect of the use on the market for the work, and the portion of the work used.⁹⁵

2. *Copyright Infringement in the PRC*

There are two types of non-criminal infringement in Chinese copyright law: infringing behaviors that qualify for civil liability only and those that warrant both civil and administrative liability.⁹⁶ Actions that qualify for civil liability include exploiting a work without the consent of the copyright owner and exploiting a work created by another without paying remuneration.⁹⁷ Eight actions can merit both civil and administrative liability, including reproducing and publishing a sound recording without the consent of the performer, and reproducing and distributing a sound recording produced by another without the consent of the producer.⁹⁸

The fair use doctrine in Chinese copyright law is more expansive than in the United States. There are twelve types of fair uses, which include use for individual study, research or enjoyment, or reprinting or re-broadcasting.⁹⁹ A work may be used in any of these ways without a license and without paying remuneration.¹⁰⁰

⁹¹ *Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 621 (6th Cir. 2004) (citing 17 U.S.C. § 501(a)).

⁹² *Gershwin Publishing Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2nd Cir. 1971).

⁹³ *Id.*

⁹⁴ 17 U.S.C. § 107 (2004).

⁹⁵ *Id.*

⁹⁶ PRC Copyright Law, arts. 46-47.

⁹⁷ *Id.* art. 46. Article 47 also lists actions that may qualify for civil liability.

⁹⁸ *Id.* art. 47.

⁹⁹ *Id.* art. 22.

¹⁰⁰ *Id.*

3. *The PRC Copyright System Features a Lack of Clarity and an Overbroad Fair Use Exception*

As compared to infringement and the fair use defense in the United States, there are two areas in which the Chinese copyright system is lacking: clarity and reasonable limits on the fair use exception. According to Chinese copyright theory, actions that infringe on the rights of the copyright holder merit only civil liability, while those that infringe on societal interests can warrant both civil and administrative liability.¹⁰¹ This distinction between individual and societal interests is not explained in the PRC Copyright Law.¹⁰² Additionally, the fair use doctrine in the PRC is very broad, as detailed above, and provides many opportunities to violate copyrights with impunity. These characteristics of Chinese copyright law inhibit protection of intellectual property rights, and thus constitute another barrier to the interests of the recording industry.

D. *The Civil and Administrative Remedies for Copyright Infringement are Harsher and More Readily Available in the United States than in the PRC*

The PRC Copyright Law provides for many of the same remedies as the U.S. Copyright Act. How the remedies are applied, however, reflects a different cultural attitude about copyright. In the United States, statutory damage caps are high.¹⁰³ In the PRC, damages are capped much lower, and administrative fines are both rarely issued and insubstantial.¹⁰⁴ While these more lenient punishments are consistent with societal ideals, they reduce the effectiveness of the law.

1. *Civil Remedies in the United States*

The U.S. Copyright Act provides for civil remedies for copyright infringement.¹⁰⁵ Possible remedies include injunction, or impound and disposition of infringing articles if reasonable to prevent or restrain

¹⁰¹ *Id.* arts. 46-47; QU, *supra* note 27, at 245.

¹⁰² PRC Copyright Law, art. 47. Article 47 provides that if the enumerated actions "simultaneously damage[] the public interest," they will warrant both civil and administrative liability, but does not explain what it means to damage the public interest. *Id.*

¹⁰³ See discussion *infra* Part II.D.1.

¹⁰⁴ See *infra* notes 119, 123-124 and accompanying text.

¹⁰⁵ 17 U.S.C. §§ 502-05 (2004).

infringement.¹⁰⁶ Damages, actual or statutory,¹⁰⁷ as well as costs and attorney's fees may also be recovered.¹⁰⁸ Copyright holders are entitled to recover actual damages caused by the infringement, in addition to any profits earned by the infringer.¹⁰⁹ The rights holder may alternatively elect to receive statutory damages determined by the court, ranging from US\$ 750 to US\$ 30,000.¹¹⁰ If the court finds that the infringement was intentional, it may increase statutory damages up to a total of US\$ 150,000.¹¹¹

2. *Civil and Administrative Remedies in the PRC*

The PRC Copyright Law provides for both civil and administrative remedies depending on the nature of the harm. Civil remedies are available when the harm is to the copyright holder.¹¹² These remedies include injunction, elimination of the effects of the infringing act, public apology, and damages.¹¹³ Administrative remedies are also available when the harm is to society.¹¹⁴ They include imposition of fines,¹¹⁵ confiscation of unlawful gains, or confiscation and destruction of the infringing products.¹¹⁶ The PRC Copyright Law provides that the infringer will pay damages for the actual harm caused to the copyright owner.¹¹⁷ If the actual harm cannot be calculated, the infringer has to turn over the profit earned.¹¹⁸ If the profit cannot be determined, the judge is authorized to award damages of up to approximately US\$ 60,000.¹¹⁹

¹⁰⁶ *Id.* §§ 502-03.

¹⁰⁷ *Id.* § 504.

¹⁰⁸ *Id.* § 505.

¹⁰⁹ *Id.* § 504.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Supra* note 101 and accompanying text.

¹¹³ PRC Copyright Law, arts. 46-47.

¹¹⁴ *Supra* note 101 and accompanying text.

¹¹⁵ Fines range from RMB 100 to RMB 50,000 (US \$12 to US \$6040), depending on the nature of the infringing action. Regulations for the Implementation of Copyright Law of the People's Republic of China, May 30, 1991, art. 51, available at http://www.isinolaw.com/jsp/law/LAW_Chapters.jsp?CatID=283&LangID=0&StatutesID=2003057 (last visited Jan. 14, 2005).

¹¹⁶ PRC Copyright Law, art. 47.

¹¹⁷ *Id.* art. 48.

¹¹⁸ *Id.*

¹¹⁹ *Id.* All values will appear in US dollars based on a currency conversion rate of US\$ 1 to Rembinbi 8.28. *Currency Exchange Rates*, WALL ST. J., Dec. 1, 2004, at C14.

3. *The PRC Copyright System Suffers from Ambiguity, a Low Statutory Damage Cap, and the Infrequency of Administrative Fines*

There are weaknesses in the Chinese civil and administrative remedies for copyright infringement. First, the harsher administrative remedies are most likely unavailable because it is not clear from the PRC Copyright Law when administrative liability is warranted.¹²⁰ Another significant problem is the statutory damage cap. In the United States, statutory damages can reach up to US\$ 150,000,¹²¹ while in the PRC, statutory damages are limited to US\$ 60,000.¹²² Higher damages are a greater disincentive to copyright infringement. Lastly, the deterrent effect of administrative fines in the PRC is questionable because the fines are too low both in the PRC Copyright Law and in practice.¹²³ When determining the amount of fines, the harm is based on the price of the infringing goods, not the price of genuine works.¹²⁴ Thus, the fines are artificially low and do not punish infringers sufficiently. These problems contribute to enforcement difficulties in the PRC and need to be resolved to allow successful prosecution for copyright infringement.

E. *The Criminal Remedies Are Also Harsher and More Readily Available in the United States than in the PRC*

Like the civil remedies in the PRC, the weakness in the criminal remedies provided is not the lack thereof, but the fact that they are rarely imposed and not strong enough to dissuade infringers. Imprisonment terms and fines are much lower in the PRC than in the United States.¹²⁵ The law is not sufficiently clear when it comes to criminal remedies, and the threshold for criminal prosecution is too high.¹²⁶

1. *Criminal Remedies in the United States*

Criminal remedies for copyright infringement in the United States include imprisonment and fines.¹²⁷ Misdemeanor violations¹²⁸ warrant up to

¹²⁰ *Supra* note 101-102 and accompanying text.

¹²¹ 17 U.S.C. § 504 (2004).

¹²² PRC Copyright Law, art. 48; IIPA, 2003 SPECIAL 301 REPORT: PEOPLE'S REPUBLIC OF CHINA 32, available at <http://www.iipa.com/rbc/2003/2003SPEC301PRC.pdf> (last visited Jan. 14, 2005).

¹²³ 2004 SPECIAL 301 REPORT, *supra* note 88, at 40.

¹²⁴ UNITED STATES INFORMATION TECHNOLOGY OFFICE, EXCERPT FROM USTR ANNUAL REPORT ON CHINA'S WTO COMPLIANCE (on file with author) [hereinafter REPORT ON CHINA'S WTO COMPLIANCE].

¹²⁵ See discussion *infra* notes 128-134, 136-141 and accompanying text.

¹²⁶ See discussion *infra* Part II.E.3.

¹²⁷ 17 U.S.C. § 506 (2004); 18 U.S.C. § 2319 (2004).

one-year imprisonment and US\$ 100,000 in fines.¹²⁹ Felony violations¹³⁰ merit a fine that can reach up to US\$ 250,000,¹³¹ and a prison sentence of either three or five years, depending on whether the requisite *mens rea*¹³² was present.¹³³ A repeat felony offense warrants a longer imprisonment and the sentences increase to either six or ten years.¹³⁴

2. Criminal Remedies in the PRC

The PRC Copyright Law provides that an infringer may be prosecuted under the criminal law if his actions constitute a crime.¹³⁵ The PRC Criminal Law allows for up to three years imprisonment, criminal detention, and fines when the infringer gains a "fairly large"¹³⁶ amount of illicit income, or there are "other serious circumstances."¹³⁷ The same punishment is available when sentencing someone for selling infringing works under similar circumstances.¹³⁸ When the amount of unlawful income is "huge"¹³⁹

¹²⁸ Misdemeanor violations include those that (1) fail to meet the statutory minimum value of US\$ 2500, (2) fail to meet the requisite ten or more copies, and (3) violate rights other than reproduction and distribution. U.S. DEPARTMENT OF JUSTICE, FEDERAL PROSECUTION OF VIOLATION OF INTELLECTUAL PROPERTY RIGHTS: PENALTIES FOR CRIMINAL COPYRIGHT INFRINGEMENT, at http://www.usdoj.gov/criminal/cybercrime/intell_prop_rts/SectIII.htm#A5a (last visited Jan. 14, 2005) [hereinafter PENALTIES FOR CRIMINAL COPYRIGHT].

¹²⁹ 18 U.S.C. §§ 2319(b)(3), (c)(3); 18 U.S.C. § 3571(b)(5) (2004); PENALTIES FOR CRIMINAL COPYRIGHT, *supra* note 128.

¹³⁰ A felony violation is the reproduction or distribution during a 180-day period of no fewer than ten copies or phonorecords, which have a total retail value of more than US\$ 2500. H.R. REP. 102-997, at 4-5 (1992), reprinted in U.S.C.A.N. 3569.

¹³¹ 18 U.S.C. § 3571(b)(3).

¹³² The required *mens rea* is infringement for the purposes of commercial advantage or private financial gain. 17 U.S.C. § 506(a)(1) (2004); DEPARTMENT OF JUSTICE, COMPUTER CRIME AND INTELLECTUAL PROPERTY SECTION: STATUTORY PENALTY FOR CRIMINAL COPYRIGHT INFRINGEMENT, at <http://www.cybercrime.gov/ipmanual/03ipma.htm#III.D> (last visited Jan. 14, 2005).

¹³³ 18 U.S.C. §§ 2319(b)(1), (c)(1).

¹³⁴ 18 U.S.C. §§ 2319(b)(2), (c)(2).

¹³⁵ PRC Copyright Law, art. 47.

¹³⁶ "Fairly large" is defined in an interpretation by the Supreme People's Court to approximately US\$ 6000 for an individual defendant and approximately US\$ 24,000 for a commercial defendant. Interpretation of the Supreme People's Court on the Application of Law in Trying the Criminal Cases of Illegal Publication, Dec. 17, 1998, art. 2, available at http://www.isinlaw.com/jsp/ji/JI_Part_Content.jsp?IsPart=0&CatID=69&LangID=0&IndexID=1998159 (last visited Jan. 14, 2005) [hereinafter Interpretation]; REPORT ON CHINA'S WTO COMPLIANCE, *supra* note 124.

¹³⁷ "Other serious circumstances" include: (1) previous civil or administrative prosecution for infringement two or more times in the past two years, (2) illicit personal business value of approximately US\$ 24,000, or illicit business value of approximately US\$ 121,000, and (3) other serious consequences. Interpretation, *supra* note 136.

¹³⁸ Where personal income exceeds approximately US\$ 12,000 or business income exceeds approximately US\$ 60,000, anyone selling infringing products is also subject to three years imprisonment, criminal detention, and fines. Zhonghua Renmin Gongheguo Xingfa [Criminal Law of the People's

or there are other "particularly serious circumstances,"¹⁴⁰ the law provides for imprisonment from three to seven years, as well as a fine.¹⁴¹

3. *The PRC Copyright System Lacks Clarity, Reasonable Thresholds, Adequate Prison Sentences, and End User Liability*

A comparison of the copyright systems of the United States and the PRC reveals several areas where the criminal enforcement of copyrights is inadequate. The PRC Criminal Law is unclear and judicial application of the law is wanting when sentencing infringers. In contrast, the U.S. copyright law is very explicit in delineating the threshold for criminal remedies. It sets the threshold based on the number of infringing copies, retail value of the copies, and number of offenses.¹⁴² Meanwhile, the PRC Copyright Law contains circular definitions of criminal behavior. For example, "serious circumstances" include "other serious circumstances."¹⁴³ Without clear standards, it is difficult to determine the appropriate sentence for copyright infringement.

Additionally, the PRC Copyright Law bases liability on the amount of illicit income or total value of the infringing products.¹⁴⁴ The value requirements for criminal action¹⁴⁵ are rarely met because they do not count counterfeit or pirated goods that have not yet been sold, and because infringers do not carefully track their sales.¹⁴⁶ These high thresholds prevent many infringers from being prosecuted.

On rare occasions when infringers are criminally prosecuted and sentenced to imprisonment, it is usually for a short duration and not an effective deterrent to infringement.¹⁴⁷ Moreover, Chinese authorities do not often forward cases for criminal prosecution.¹⁴⁸ Thus, infringers simply see

Republic of China] (adopted by the Second Session of the Fifth National People's Congress, July 1, 1979, amended by the Fifth Session of the Eighth National People's Congress, Mar. 14, 1997) art. 218 (PRC) [hereinafter PRC Criminal Law]; Interpretation, *supra* note 136.

¹³⁹ "Huge" is defined as: (1) illegal personal gains of at least approximately US\$ 24,000, or (2) illegal business gains of at least approximately US\$ 121,000. Interpretation, *supra* note 136.

¹⁴⁰ "Particularly serious circumstances" include: (1) illicit personal business value that exceeds approximately US\$ 121,000, or illicit business value exceeds approximately US\$ 604,000, and (2) other extraordinarily serious consequences. *Id.*

¹⁴¹ PRC Criminal Law, art. 217.

¹⁴² See *supra* notes 128, 130 and accompanying text.

¹⁴³ Interpretation, *supra* note 136.

¹⁴⁴ See *infra* note 146 and accompanying text.

¹⁴⁵ See *supra* notes 136-140 and accompanying text.

¹⁴⁶ REPORT ON CHINA'S WTO COMPLIANCE, *supra* note 124.

¹⁴⁷ See Lisa Movius, *Imitation Nation*, SALON.COM, July 8, 2002, at http://www.salon.com/tech/feature/2002/07/08/imitation_nation/ (last visited Jan. 14, 2005).

¹⁴⁸ See REPORT ON CHINA'S WTO COMPLIANCE, *supra* note 124.

finances and seizures as a cost of doing business.¹⁴⁹

Another problem with the PRC Criminal Law is that end-users are not held liable.¹⁵⁰ Criminal liability is only based on the amount of illicit income generated or the value of the illegal business.¹⁵¹ The demand for pirated products runs unchecked because end-users cannot be punished for infringement. Copyright holders are lacking an important weapon in the fight against piracy. For the recording industry to succeed in defending its rights in the PRC, harsher consequences for all infringers are necessary.

F. The Structure of Enforcement is Simpler in the United States than in the PRC

Without easy enforceability, the best laws and intentions will not be sufficient to provide protection. Enforcement of copyrights in the United States is easy due to the simple structure of enforcement.¹⁵² In contrast, the PRC's copyright system features two tracks for prosecution, which complicates enforcement efforts.¹⁵³

1. Copyright Enforcement in the United States

In the United States, a copyright holder is entitled to institute a civil action for infringement in a federal court.¹⁵⁴ A plaintiff may make claims for relief in the complaint,¹⁵⁵ and the court determines the appropriate remedies among those provided in the Copyright Act.¹⁵⁶ Determinations of copyrightability, non-monetary damages, and issues of fact are reserved for the judge.¹⁵⁷

2. Copyright Enforcement in the PRC

There are two methods of prosecution for copyright infringement in the PRC: the judicial track and the administrative track.¹⁵⁸ The judicial

¹⁴⁹ See Movius, *supra* note 147.

¹⁵⁰ See 2004 SPECIAL 301 REPORT, *supra* note 88, at 35-36.

¹⁵¹ See *supra* notes 136-140 and accompanying text.

¹⁵² See discussion *infra* Part II.F.1.

¹⁵³ See discussion *infra* Parts II.F.2-3.

¹⁵⁴ 17 U.S.C. § 501 (2004).

¹⁵⁵ Fed. R. Civ. P. 8(a) (2004).

¹⁵⁶ 17 U.S.C. §§ 502-506 (2004).

¹⁵⁷ 3 NIMMER & NIMMER, *supra* note 68, § 12.10.

¹⁵⁸ AMERICAN EMBASSY IN CHINA, PROTECTING YOUR INTELLECTUAL PROPERTY RIGHTS (IPR) IN CHINA, at <http://www.usembassy-china.org.cn/ipr/ovview.html> (last visited Jan. 14, 2005) [hereinafter PROTECTING IPR IN CHINA]; CENTER FOR INTERNATIONAL PRIVATE ENTERPRISE, INTELLECTUAL PROPERTY

process involves filing a complaint in a specialized court system for intellectual property.¹⁵⁹ The administrative process requires the rights holder to file a complaint with the National Copyright Administration ("NCA").¹⁶⁰ The NCA is the administrative authority at the national level, but there are also copyright administration and management bodies at the local levels.¹⁶¹ To prosecute an infringer criminally, individuals must either pursue the case themselves,¹⁶² or the administrative authorities must forward the case to the Ministry of Public Security for investigation.¹⁶³

3. *The PRC Copyright System Suffers from Complexity, Redundancy, and a Lack of Expertise and Coordination*

Compared to the simple structure of enforcement in the United States, the PRC system is very complicated. Because there is only one track for enforcement of copyright in the United States, it is clear to copyright holders what they must do to protect their intellectual property. It is not necessary to work with the U.S. Copyright Office. Meanwhile, in the PRC, there are two alternative tracks for rights enforcement, neither of which is effective because of numerous flaws.

The judicial route to copyright enforcement in the PRC is problematic for several reasons. First, there is a lack of adequate legal training among judges, especially concerning intellectual property issues.¹⁶⁴ During the Cultural Revolution many of the most qualified legal professionals were "reeducated,"¹⁶⁵ and thus most lawyers with adequate legal training are too young to serve as judges.¹⁶⁶ This lack of education and experience is especially detrimental because the Chinese legal system is inquisitorial, requiring judges to determine significant facts.¹⁶⁷ Additionally, the lack of any adequate case-reporting system makes reliance on precedent practically

PROTECTION IN CHINA, Nov. 1, 1996, at <http://www.cipe.org/publications/fs/ert/e19/zizhen.htm> (last visited Jan. 14, 2005).

¹⁵⁹ PROTECTING IPR IN CHINA, *supra* note 158.

¹⁶⁰ The NCA is empowered to interpret the PRC Copyright Law and handle copyright-related disputes throughout the PRC. Shuk Ki Ella Cheong, *Copyright Law and Regulation in China*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE, *supra* note 13, at 50-53.

¹⁶¹ *Id.*

¹⁶² Prosecution by wronged individuals is rare. PROTECTING IPR IN CHINA, *supra* note 158.

¹⁶³ REPORT ON CHINA'S WTO COMPLIANCE, *supra* note 124.

¹⁶⁴ Yu, *supra* note 81, at 214.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*; Gregory S. Kolton, Comment, *Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts*, 17 U. PA. J. INT'L ECON. L. 415, 450 (1996).

impossible, making it harder for judges to consistently decide cases.¹⁶⁸

The administrative route is also troublesome because of the lack of coordination between enforcement authorities and the protection of infringers by local authorities.¹⁶⁹ "Virtually all enforcement in China is done through a complex and overlapping local, provincial, and national administrative system."¹⁷⁰ This administrative track is ineffective because the national office lacks control over the local agencies,¹⁷¹ and thus enforcement activities are difficult to coordinate. U.S. companies have voiced concerns that in most regions of the PRC, the police are engaged in local protectionism and are not interested in pursuing counterfeiting and piracy cases, or lack the resources and training to investigate them.¹⁷² Local authorities often seek to protect factories producing pirated goods because they are beneficial to the area's economy.¹⁷³ Many of the factories that produce pirated CDs are partly state-owned.¹⁷⁴ Moreover, it is not always clear under Chinese law what type of enforcement activity is required. When infringement occurs, criminal enforcement is not pursued.¹⁷⁵ When criminal enforcement is pursued, prosecution requires coordination between a large number of both national and local agencies, which is difficult to attain when the agencies are unwilling or unable to work together.¹⁷⁶

There are many defects in the enforcement structure of the Chinese copyright law. These problems are especially significant because without effective enforcement, having the clearest and toughest laws will not be sufficient. In light of the differing copyright systems of the United States and the PRC, American solutions based on the supremacy of individual rights will not be successful in the PRC, where the interests of society predominate. Because the PRC enacted copyright protection only in response to international pressure, the existing copyright system is without cultural basis and, accordingly, deficient. It is like an ill-fitting piece of clothing—the internal support is missing and it does not provide proper coverage. By incorporating Chinese cultural beliefs, however, American responses to online music piracy can be tailored to achieve success in the PRC.

¹⁶⁸ Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245, 258-59 (1992).

¹⁶⁹ See 2003 SPECIAL 301 REPORT: PEOPLE'S REPUBLIC OF CHINA, *supra* note 122, at 28-29.

¹⁷⁰ *Id.* at 28.

¹⁷¹ PROTECTING IPR IN CHINA, *supra* note 158.

¹⁷² REPORT ON CHINA'S WTO COMPLIANCE, *supra* note 124.

¹⁷³ Movius, *supra* note 147.

¹⁷⁴ Eric Griffin, Note, *Stop Relying on Uncle Sam! – A Proactive Approach to Copyright Protection in the People's Republic of China*, 6 TEX. INTELL. PROP. L. J. 169, 183 (1998).

¹⁷⁵ REPORT ON CHINA'S WTO COMPLIANCE, *supra* note 124.

¹⁷⁶ *Id.*

III. AN EVALUATION OF THE EFFICACY OF U.S. RESPONSES TO ONLINE MUSIC PIRACY SHOWS THAT SUCCESS HAS BEEN LIMITED

In the United States, the recording industry is using several tactics to stop individuals from pirating music over the Internet. These strategies include lobbying the government for legislation, providing fee-based services that offer the same products, and pursuing individual Internet users for copyright infringement.¹⁷⁷ An analysis of these responses and their efficacy will help determine whether or not they can be applied with success in the PRC.

A. *U.S. Copyright-Related Legislation is Extensive, but not Sufficient to Prevent Music Piracy*

The United States has been wrestling with Internet-related copyright enforcement problems for years, and has enacted three pieces of legislation to address these issues. The Audio Home Recording Act was passed in 1992 and deals with noncommercial audio home taping of digital works.¹⁷⁸ It requires digital audio recording devices to incorporate copying controls,¹⁷⁹ causes manufacturers and importers to pay royalties to the owners of copyrighted works that have been put in a digital format,¹⁸⁰ and limits liability for production or distribution of devices that enable digital recording.¹⁸¹ The No Electronic Theft Act ("NET Act") was passed in 1997 and amended the U.S. criminal copyright infringement provisions to strengthen copyright protection in the digital age.¹⁸² Most significantly, the NET Act provides that an infringer can be prosecuted for reproduction or distribution of copyrighted works regardless of financial motive.¹⁸³ Lastly, the Digital Millennium Copyright Act ("DMCA") was enacted in 1998. As detailed above, the DMCA implements the WIPO Internet Treaties.¹⁸⁴ It also

¹⁷⁷ See *infra* Part III.A-D.

¹⁷⁸ Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (codified in scattered sections of 17 U.S.C. & 19 U.S.C.); 2 NIMMER & NIMMER, *supra* note 68, at § 8B.01 (2004).

¹⁷⁹ 17 U.S.C. § 1002 (2004).

¹⁸⁰ *Id.* §§ 1003-07.

¹⁸¹ *Id.* § 1008.

¹⁸² No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (codified in scattered sections of 17 U.S.C., 19 U.S.C. and 28 U.S.C.); Department of Justice: Computer Crime and Intellectual Property Section, *The No Electronic Theft ("NET") Act: Summary of Changes to the Criminal Copyright and Trademark Laws*, at <http://www.usdoj.gov/criminal/cybercrime/netsum.htm> (last visited Jan. 14, 2005).

¹⁸³ Poznak Law Firm, Ltd., *New Criminal Penalties for Copyright Infringement on the Net*, at <http://www.poznaklaw.com/articles/netact.htm> (last visited Jan. 14, 2005).

¹⁸⁴ See *supra* note 56.

addresses liability for copyright infringement by Internet service providers.¹⁸⁵

While these laws aim to prevent copyright infringement, laws by themselves are not sufficient to solve the problem. Of an estimated twenty three million Americans downloading music,¹⁸⁶ one-third use peer-to-peer networks which allow them to swap music without cost.¹⁸⁷ Another twenty four percent say they use email and instant messaging to transfer music free of charge.¹⁸⁸ This is evidence that laws alone cannot produce the necessary change.

B. *Incorporating Copy-Protection Technology is Innovative, but not a Practical Solution*

Incorporating copy-protection technology into CD production has been a controversial method of preventing online piracy. According to Macrovision, a vendor of copy-protection technology, there are ten million copy-protected CDs in circulation.¹⁸⁹ While this technology prevents users from copying music from CDs onto their computer for distribution over the Internet, it also prevents copying music for download onto MP3 players.¹⁹⁰ Other forms of copy protection include inserting audible noises that are copied from CD to computer¹⁹¹ or technology that only allows the music to be played for a limited duration.¹⁹² While copy-protection technologies inhibit copying, they also interfere with legitimate fair uses.¹⁹³ Little has been written discussing the effectiveness of these technologies, but there are ways to circumvent copy-protection.¹⁹⁴ Also, the public reaction to these

¹⁸⁵ Codified in § 512 of Title 17, the DMCA limits the liability of Internet service providers in four areas: (1) transitory digital network communications, (2) system caching, (3) information residing on networks or systems at direction of users, and (4) information location tools. In each of these areas, monetary damages are prohibited, and injunctive relief is restricted. THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, *supra* note 56.

¹⁸⁶ Pew Internet and American Life, *Pew Internet Project and comScore Media Metrix Data Memo*, at 1, April 2004, available at http://www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf (last visited Jan. 14, 2005) [hereinafter *Pew Internet Project*].

¹⁸⁷ *Id.* at 4.

¹⁸⁸ *Id.*

¹⁸⁹ *Unintended Consequences*, *supra* note 9, at 7.

¹⁹⁰ *Id.*

¹⁹¹ John Borland, *Protected CDs Quietly Slip into Stores*, NEWS.COM, July 18, 2001, at http://news.com.com/2102-1023_3-270164.html (last visited Jan. 14, 2005).

¹⁹² *SunnComm Ships More than One Million MediaMax CDs in U.S. for March 2004*, BUSINESS WIRE, Apr. 5, 2004, LEXIS, Nexis Library, All News File.

¹⁹³ Jacob Weiss, Note, *Harmonizing Fair Use and Self-Help Copyright Protection of Digital Music*, 30 RUTGERS COMPUTER & TECH. L.J. 203, 213 (2004).

¹⁹⁴ Campaign for Digital Rights, *Corrupt Audio Disks, aka "Copy-Protected CDs"*, at <http://ukcdr.org/issues/cd/quick/> (last visited Jan. 14, 2005).

technologies has been negative. There have been several lawsuits against the recording companies for employing copy-protection.¹⁹⁵ Although innovative, copy-protection technologies are not currently proving to be a practical solution to the problem of piracy.

C. *Fee-Based Music Downloading Services Have Enjoyed Some Success, but Have Not Eliminated Music Piracy*

Fee-based music downloading services have recently emerged to serve consumers who want to download music without breaking the law. These services appeared on the market after *A&M Records, Inc. v. Napster, Inc.*,¹⁹⁶ a 2001 Ninth Circuit decision which resulted in the termination of Napster,¹⁹⁷ a free music downloading service. This case was groundbreaking in the prosecution of online music piracy, because it applied existing copyright law to new technology.¹⁹⁸ The issue was whether Napster was merely facilitating infringement by providing people with the means of downloading music for free, or, alternatively, knowingly contributing to large-scale infringement by users.¹⁹⁹ Napster was held liable for copyright infringement,²⁰⁰ and the company's website was taken down.²⁰¹ In October 2003, Napster came back as a fee-based service.²⁰² In addition to Napster, there are a number of other pay-services, including Apple's iTunes, AOL MusicNet, MusicNow, and MusicMatch's MX.²⁰³ The exact number of users of fee-based download services is not available, but research indicates that only seventeen percent of those who download music, or approximately four million people, are using these services.²⁰⁴ Despite the success of the downloading services, it is still questionable whether they can eliminate online piracy.

¹⁹⁵ Weiss, *supra* note 193, at 210; Megan E. Gray & Will T. DeVries, *The Legal Fallout from Digital Rights Management Technology*, THE COMPUTER & INTERNET LAWYER 20 (2003).

¹⁹⁶ *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

¹⁹⁷ Corey Rayburn, *After Napster*, 6 VA. J.L. & TECH. 16, para. 46 (2001).

¹⁹⁸ Raju Chebium, *Napster, DVD Case Raise Copyright Questions in the Digital Age*, CNN.COM, Aug. 7, 2000 at <http://www.cnn.com/2000/LAW/08/07/copyright.overview> (last visited Jan. 14, 2005).

¹⁹⁹ *Id.*

²⁰⁰ See *A&M Records*, 239 F.3d 1004.

²⁰¹ *Napster Shutdown Seen as Potential Boon for Competitors*, CNN.COM, July 27, 2000, at <http://www.cnn.com/2000/LAW/07/27/napster.backlash/> (last visited Jan. 14, 2005).

²⁰² See Napster, *What is Napster?*, at http://www.napster.com/what_is_napster.html (last visited Jan. 14, 2005).

²⁰³ Laurianne McLaughlin, *Music Downloads: Is it Time to Pay?*, PCWORLD.COM, June 5, 2003, at <http://www.pcworld.com/resource/printable/article/0,aid,111040,00.asp> (last visited Jan. 14, 2005).

²⁰⁴ *Pew Internet Project*, *supra* note 186at 4.

D. *The RIAA Lawsuits Have Been Relatively Effective, but Have Generated a Significant Public Backlash*

The American recording industry has begun suing individual Internet users who illegally download music.²⁰⁵ To date, the RIAA has filed suits against more than 1300 file sharers, and as of January 2004, settled about 300 of those suits.²⁰⁶ According to the RIAA, these lawsuits serve several purposes, including protecting the interests of copyright holders, educating the public about copyright law, and encouraging consumers to use legal means of downloading music.²⁰⁷ RIAA President Cary Sherman said:

We've been telling people for a long time that file sharing copyrighted music is illegal, that you are not anonymous when you do it, and that engaging in it can have real consequences. . . . We hope to encourage even the worst offenders to change their behavior, and acquire the music they want through legal means.²⁰⁸

The RIAA believes that the lawsuits are effective. It maintains that music downloads have decreased since the commencement of the suits and that people are more aware of the fact that downloading music is illegal.²⁰⁹

Despite the RIAA's claims, the success of the RIAA lawsuits is questionable. According to a survey done by the Pew Internet & American Life Project, the percentage of Americans who downloaded music fell eleven percent from spring 2003 to spring 2004.²¹⁰ Additionally, there was a drop in online file-sharing.²¹¹ While a decrease in downloading appears positive, it has had a detrimental effect on legitimate fee-based download services. The study indicates that of current music downloaders, about six million Internet users said that they were downloading less because of the RIAA

²⁰⁵ RIAA Press Release, *supra* note 6.

²⁰⁶ See *Music Industry Suing 532 Song Swappers*, CNN.COM, Jan. 26, 2004, at <http://www.cnn.com/2004/TECH/internet/01/22/online.music/index.html> (last visited Jan. 14, 2005); Press Release, RIAA, New Round of Illegal File Sharing Lawsuits Brought By RIAA (June 22, 2004), at <http://www.riaa.com/news/newsletter/062204.asp> (last visited Jan. 14, 2005).

²⁰⁷ Press Release, RIAA, RIAA Brings New Round of Cases Against Illegal File Sharers, (Mar. 23, 2004), at <http://www.riaa.com/news/newsletter/032304.asp> (last visited Jan. 14, 2005).

²⁰⁸ RIAA Press Release, *supra* note 6.

²⁰⁹ Jon Bonné, *Big Drop in Music Downloads*, MSNBC.COM, Jan. 4, 2004, at <http://www.msnbc.msn.com/id/3860823/> (last visited Jan. 14, 2005).

²¹⁰ See *Pew Internet Project and comScore Media Metrix Data Memo*, April 2004, *supra* note 186, at 4.

²¹¹ *Id.* at 5.

lawsuits.²¹² In addition, sixty percent of Internet users who had never downloaded music said that the RIAA lawsuits would prevent them from ever trying.²¹³ The deterrent effect of the RIAA lawsuits is too strong—it is not only keeping consumers from engaging in illegal transactions, but from legitimate ones as well.

The actions taken by the RIAA are the most contentious response to online music piracy. While legislation attracted attention by various industry groups, it was not until the recording industry began targeting individual consumers that the public noticed, and public opinion has been negative.²¹⁴ Numerous websites express views that oppose the RIAA.²¹⁵ A prime example is boycott-riaa.com.²¹⁶ The website asks visitors to help stop the lawsuits by educating themselves about copyright and the RIAA lawsuits, not purchasing music from RIAA members, contacting their legislators, educating others, and supporting independent labels and music groups.²¹⁷

Some music artists have also expressed their displeasure with the RIAA. “Instead of spending all this money litigating against kids who are the people they’re trying to sell things to in the first place, they have to learn how to effectively use the Internet,” said David Draiman of Disturbed, a hard-rock band.²¹⁸ “File sharing is a reality, and it would seem that the labels would do well to learn how to incorporate it into their business models somehow,” said musician Moby in a post on his website.²¹⁹ “Record companies suing 12-year-old girls for file sharing is kind of like horse-and-buggy operators suing Henry Ford.”²²⁰

With members of the general public and the recording community upset with the RIAA’s actions, public relations have soured. As alluded to by Moby’s statement above, the first settlement reached by the RIAA with an individual consumer was the US\$ 2000 payout by the single mother of a

²¹² *Id.* at 1.

²¹³ *Id.* at 2.

²¹⁴ See Jefferson Graham, *RIAA Lawsuits Bring Consternation and Chaos*, USATODAY.COM, Sept. 10, 2003, available at http://www.usatoday.com/tech/news/techpolicy/2003-09-10-riaa-suit-reax_x.htm (last visited Jan. 14, 2005).

²¹⁵ See generally www.boycott-riaa.com (last visited Jan. 14, 2005); www.eff.com (last visited Jan. 14, 2005) (website for the Electronic Frontier Foundation); www.dieriaa.net/firms.com/index.htm (last visited Jan. 14, 2005); and www.magnetbox.com/riaa/ (last visited Jan. 14, 2005).

²¹⁶ *Boycott-RIAA.com, Resource Pamphlet: Boycott RIAA Music – Buy Indie*, at <http://www.boycott-riaa.com/resources/pamphlet1.PDF> (last visited Jan. 14, 2005).

²¹⁷ *Id.*

²¹⁸ Joel Selvin & Neva Chonin, *Artists Blast Record Companies Over Lawsuits Against Downloaders*, S.F. CHRON., Sept. 11, 2003, at A-4.

²¹⁹ Moby, *Moby Journal: File-Sharing*, Sept. 10, 2003, at <http://www.moby.com/index2.html> (last visited Jan. 14, 2005).

²²⁰ *Id.*

twelve-year-old girl who had been downloading music.²²¹ Anthony Prapkanis, a University of California-Santa Cruz professor of social psychology, says that “the image is out there of the bully ganging up on people with the least amount of money, the rich taking from the poor.”²²² The chairman of the Senate's Permanent Subcommittee on Investigations began an inquiry into the industry's crackdown against music swappers, calling the campaign “excessive.”²²³ “Theft is theft, but in this country we don't cut off your arm or fingers for stealing,” said Senator Norm Coleman, who worked in the music industry during the 1960s.²²⁴

Lawsuits, while unpopular, have been the most effective means of curbing illegal music downloading. Amending the copyright law to address issues raised by new technology and using technology to inhibit copying have been important responses, but these solutions have not made much of an impact. The only other successful method implemented in the United States has been operation of fee-based downloading services. Due to cultural differences, however, the efficacy of these responses in the PRC will be limited.

IV. THE PRC SHOULD ADOPT AND MODIFY U.S. SOLUTIONS TO ACCOMMODATE CHINESE CULTURE IN ORDER TO SUCCESSFULLY CONFRONT ONLINE MUSIC PIRACY

The reasons for online music piracy in the United States include: unwillingness to pay,²²⁵ desire to acquire a portion of the product,²²⁶ ability to sample music before acquisition,²²⁷ greater variety of music available online,²²⁸ ignorance of the law,²²⁹ and difficulty of detection.²³⁰ These justifications for illegally downloading music are not limited to the United

²²¹ Graham, *supra* note 214.

²²² *Id.*

²²³ *Downloaders Don't Think of Copyright Laws*, USATODAY.COM, July 31, 2003, at http://www.usatoday.com/tech/news/techpolicy/2003-07-31-copyright-so-what_x.htm (last visited Jan. 14, 2005).

²²⁴ *Id.*

²²⁵ Mike Prevatt, *Why I Download: Confessions of a Music Junkie*, LAS VEGAS CITYLIFE, July 11, 2002, at <http://www.alternet.org/story.html?StoryID=13577> (last visited Jan. 14, 2005).

²²⁶ Martha Irvine, *Students Air Opinions on Pirating Music from the Web -- and Industry Attempts to Stop the Practice*, DETROITNEWS.COM, Mar. 21, 2003, at <http://www.detroitnews.com/2003/technology/0303/24/technology-114618.htm> (last visited Jan. 14, 2005).

²²⁷ *Id.*

²²⁸ Prevatt, *supra* note 225.

²²⁹ Graham, *supra* note 214.

²³⁰ Pro-Music, <http://www.pro-music.org/freemusic.htm> (last visited Jan. 14, 2005).

States, and most likely also exist in the PRC.²³¹ Because of this, American solutions to the problem could be successful if altered to respond to the differences in the Chinese culture.

A. The PRC Should Augment Digital Rights Management Legislation

The PRC should pass laws that address digital rights management. Presently, the PRC does not have any laws specifically dealing with online copyright infringement. The People's Supreme Court issued an Interpretation²³² that deals with Internet infringement.²³³ It provides for protection of digital works under the PRC Copyright Law and imposes liability on network service providers who allow or aid copyright infringement on their networks.²³⁴ While this is a good start, it does not compare to the U.S. DMCA, which provides for subpoena power, or the NET Act, which thoroughly addresses copyright issues in the digital era. Accordingly, the PRC should promulgate similar laws regarding Internet piracy. In addition, the PRC should ratify the WIPO Internet Treaties. While these laws will not be sufficient to entirely thwart the problem, they will form the foundation needed for successful prevention.

B. The PRC Should Forgo Incorporating Copy-Protection Technology

Adding copy-protection technology to music CDs produced in the PRC would make little difference in the struggle against online piracy. There is little literature about copy-protection technologies, probably because the protection provided is inadequate or unpopular. Because most pirated music originates from the United States,²³⁵ copy-protecting CDs produced in the PRC would not impact the piracy problem. Copy-protecting CDs of American artists may help curb the copying of recent music, but there are ways around such protection and nothing would prevent the

²³¹ The PRC has the added cultural perception of intellectual property rights being undesirable. See discussion *supra* Part II.A.2.

²³² Interpretations by the People's Supreme Court are a source of law in the PRC. ISINOLAW RESEARCH CENTRE, JUDICIAL INTERPRETATION, at http://www.isinolaw.com/jsp/ji/JI_Main.jsp?CatID=10&LandID=0 (last visited Jan. 14, 2005).

²³³ Interpretation of the People's Supreme Court on Application of Laws When Trying Dispute Cases Concerning Computer Network Copyright, Dec. 21, 2000, available at http://www.isinolaw.com/jsp/ji/JI_Part_Content.jsp?CatID=71&LangID=0&IsPart=0&IndexID=73 (last visited Jan. 14, 2005).

²³⁴ Luke Minford, *PRC – The Revised Copyright Law – What Does It Mean for Right Holders?*, Feb. 3, 2002, available at <http://www.iprights.com/publications/articles/article85.asp?articleID=158> (last visited Jan. 14, 2005).

²³⁵ See generally Keith B. Richburg, *U.S., China Keep Talking as Trade Deadline Passes*, WASHINGTON POST, June 17, 1996, at A01 (indicating that the piracy of American music, films, and software was significant enough to precipitate a trade war between the United States and PRC).

copying of older CDs. Moreover, copy-protection technologies would probably meet with the same negative response evident in the United States. Because the Chinese copyright system focuses on the interests of society over the rights of the individual, the right to fair use will be seen as outweighing the benefits of copy-protection.

C. The PRC Should Provide Fee-Based Music Downloading Services

One of the most effective piracy prevention methods in the United States has been the operation of fee-based music downloading services. While these services may be commercially successful in the PRC, they will not be sufficient to impede online music piracy. To make their music catalogs available online in the United States, several major record labels have formed partnerships with downloading services.²³⁶ Napster was able to continue operating as a fee-based service,²³⁷ and other such services are enjoying increasing business.²³⁸ Fee-based services did not appear in the United States until after the problem had become widespread, and users have therefore been reluctant to sign up. By creating such services in the PRC before the problem of online piracy gets out of proportion, the music industry may be able to eliminate some of the reasons for online piracy, while giving Chinese consumers a legitimate way to obtain music online. This will not, however, significantly prevent piracy because the underlying cultural reasons for piracy will still exist. Until the idea of copyright resonates with Chinese culture, there will be little incentive to obtain music legally.

D. The PRC Should Abstain from Pursuing Infringement Actions Against Internet Users Who Illegally Download Music

In the PRC, prosecution of illegal music downloaders would be ineffective at best, and at worst, severely detrimental to efforts to improve copyright protection. In a country where the intellectual property industries are trying to encourage the recognition and support of intellectual property rights, imposing liability on individuals would have the opposite effect. Rather than scaring people away from downloading music, lawsuits would

²³⁶ George A. Chidi Jr., *Rioport, MTVi to Offer Fee-Based Music Downloads*, CNN.COM, Apr. 5, 2001, at <http://www.cnn.com/2001/TECH/internet/04/05/rioport.mtvi.music.idg/index.html> (last visited Jan. 14, 2005).

²³⁷ See Press Release, Napster, Napster's Back (Oct. 29, 2003), available at http://www.napster.com/press_releases/pr_031029.html (last visited Jan. 14, 2005).

²³⁸ See McLaughlin, *supra* note 203.

likely offend the socialist conception of copyright. The average monthly income for an urban Chinese household is about US\$ 223,²³⁹ and the costs to settle a lawsuit would be prohibitive. Moreover, because the PRC's judicial system is already ill-equipped to handle intellectual property disputes,²⁴⁰ lawsuits against consumers would meet with little success. Pursuing individual liability will therefore not be an effective method of dealing with online piracy in the PRC.

E. The PRC Should Block Internet Access to Infringing Websites

One other U.S. prevention method that could be applied with some effectiveness in the PRC is blocking access to infringing websites. The American music industry employed this method when a judge ordered Napster to shut down.²⁴¹ In the PRC, the government is already engaged in Internet censorship, blocking access to political, human rights, and Taiwanese websites.²⁴² Thus, the PRC has the resources and the ability to prevent users from reaching the offending Internet sites, and should use them.

Some of the same methods used in the United States can be applied in the PRC because the reasons that people engage in online music piracy are the same. In the PRC, however, the responses that resonate with the Chinese belief in the rights of society will be the most effective. Therefore, suing individual Internet users and providing fee-based services would not be very effective, but blocking Internet access could be. However, this method alone will not be sufficient to achieve the desired result. The PRC needs to adopt policies that take into account Chinese values, economics, and culture.

V. AN APPROACH BASED ON HARMONIZING THE CONCEPT OF COPYRIGHT WITH CHINESE VALUES COULD HELP PREVENT BOTH TRADITIONAL AND ONLINE MUSIC PIRACY IN THE PRC

To prevent online music piracy, changes must be made to harmonize the idea of copyright with Chinese values, thus diminishing the occurrence of all forms of piracy. If the current Chinese copyright system is like an ill-

²³⁹ CHINA INTERNET INFORMATION CENTER, CHINA STATISTIC DATA (Nov. 2003), at <http://www.china.org.cn/e-company/04-01-20/page031114.htm> (last visited Jan. 14, 2005).

²⁴⁰ See discussion *supra* Part II.F.3.

²⁴¹ See *A&M Records*, 239 F.3d 1004.

²⁴² See *China's Internet Censorship*, CBSNEWS.COM, Dec. 3, 2002, at <http://www.cbsnews.com/stories/2002/12/03/tech/main531567.shtml> (last visited Jan. 14, 2005); Alfred Hermida, *Behind China's Internet Red Firewall*, BBC NEWS ONLINE, Sept. 3, 2002, at <http://news.bbc.co.uk/2/hi/technology/2234154.stm> (last visited Jan. 14, 2005).

fitting piece of clothing, either the clothing needs to be changed or the PRC must grow into it. The PRC must be encouraged to grow into the standards demanded by the international community. The key to this growth is consistency with Chinese cultural beliefs and needs.

A. Chinese Policy-Makers Should Educate Chinese Society About the Benefits of Copyright Enforcement

Since Chinese copyright law tends to value the collective over the individual,²⁴³ the first step is to better educate the Chinese people on how copyright enforcement will benefit their society. Foreign companies want access to the Chinese market, but hold back in fear of losing their intellectual property. For example, in 1989, Disney left the PRC for four years due to piracy losses totaling US\$ 2.6 million.²⁴⁴ Disney cited the PRC's strengthening of copyright laws as the reason for its return.²⁴⁵ The inability of foreign companies to defend their intellectual property rights presents a significant barrier to investment in the PRC. If the PRC could create a safe atmosphere for foreign companies, more money would be available to the economy, jobs would be created, and tax revenues would increase. Such effects are beneficial to society and would serve as a motivation for protecting intellectual property.

B. Companies Should Set Prices According to Purchasing Power of Chinese Consumers

Lowering the price of legitimate music CDs to a level based on the purchasing power of the average Chinese citizen will help reduce the incentive to pirate music. In 1998, a pirated CD cost less than US\$ 2, while a legitimate one cost approximately US\$ 15,²⁴⁶ and the average Chinese consumer had to pay a whole week's earnings²⁴⁷ for a legitimate CD. Local officials for the Beijing Olympic Games recognized that the inability of local residents to purchase legitimate goods drives piracy. They pledged to factor in "the purchasing power of the Chinese common people" when setting

²⁴³ QU, *supra* note 27, at 71.

²⁴⁴ Michael Duckworth, *Disney to Re-enter the China Market with New Venture*, WALL ST. J., March 23, 1993, at B5.

²⁴⁵ *Mickey Mouse Back in China*, N.Y. TIMES, June 3, 1993, at D4.

²⁴⁶ *Chinese Consumers' Perception of Intellectual Property Rights*, ASIA PAC. ECON. REV., Feb. 1, 1998.

²⁴⁷ The average monthly disposable income for an urban household in June 2004 was 783 yuan or approximately US\$ 95. NATIONAL BUREAU OF STATISTICS, INCOME OF URBAN HOUSEHOLD BY REGION, at http://www.stats.gov.cn/english/statisticaldata/monthlydata/t20031121_402169718.htm (last visited Jan. 14, 2005).

prices.²⁴⁸ Lowering prices to reflect the buying power of the average Chinese household will help artists to be better perceived as contributing to society, and will make consumers more willing to purchase legitimate goods.

C. *The Chinese Government Should Allow Greater Public Access to Legitimate Goods*

Another method of combating piracy is to allow greater public access to legitimate goods. By doing this, the Chinese government would be acting consistently with socialism and the promotion of copyright. At this time, the government controls the flow of imports into the country.²⁴⁹ In 2001, PRC censors permitted the import of only 700 foreign music titles.²⁵⁰ Because imports are so limited, the demand for pirated goods is great. "If [the PRC] more fully relaxed or lifted barriers to market participation by foreign [intellectual property rights] owners, those foreign owners could sell their own goods in [the PRC], and thereby displace, at least to some extent, pirate[d] products that now have Chinese markets to themselves."²⁵¹

D. *The Chinese Government Should Increase Supervision of Local Copyright Enforcement Personnel*

The structure of the Chinese government is also a barrier to enforcement of intellectual property rights. Under Deng Xiaoping's leadership, much control was transferred to local governments, including control over copyrights.²⁵² Copyright enforcement therefore varies by geographic location. Local copyright bureaus are departments of the local government, rather than subsidiary offices of the National Copyright Administration ("NCA").²⁵³ Accordingly, local authorities have their own agendas, which may not coincide with national policies.²⁵⁴ When a pirating operation benefits the local community, officials may not want to shut it down for fear of losing jobs, local revenue, and personal profits.²⁵⁵ Further confusion ensues given that the NCA may also investigate copyright issues

²⁴⁸ Ted Anthony, *China Launches Efforts to Protect Logo*, SLAM SPORTS.COM, Aug. 13, 2003, at <http://slam.canoe.ca/Slam/Olympics/2008Beijing/2003/08/13/159997-ap.html> (last visited Jan. 14, 2005).

²⁴⁹ 2004 SPECIAL 301 REPORT, *supra* note 88, at 46-49.

²⁵⁰ Neil Gough, *Zombie Discs*, TIME ASIA, Jan. 27, 2003, at 38.

²⁵¹ Butterson, *supra* note 31, at 1105.

²⁵² *Id.* at 1097.

²⁵³ PETER FENG, INTELLECTUAL PROPERTY IN CHINA 18 (2003).

²⁵⁴ Robert T. Yonehara, Comment, *Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for the Enforcement of Copyright Laws*, 9 UCLA ENT. L. REV. 389, 403-04 (2002).

²⁵⁵ *Id.*

locally.²⁵⁶ The enforcement system must be reformed to eliminate these problems.

The best way to achieve the needed reform is to delegate all responsibility for the copyright system back to the NCA. In doing so, there will be a chain of authority, and local enforcement personnel will answer to their NCA supervisors. Establishing such a structure will prevent local interests from interfering with the protection of copyrighted works, in addition to simplifying the enforcement structure by designating a single authority. Requiring supervision of local authorities does not conflict with the purpose behind the decentralization,²⁵⁷ because copyrights are a national issue, not just a local one.²⁵⁸ This step is necessary to improve copyright protection, an important societal goal for the PRC because a flourishing copyright industry benefits both the economy and the culture. Providing a clear delegation of power and authority to the NCA will address some of the administrative defects in the Chinese copyright system.

E. Chinese Authorities Should Also Encourage Domestic Intellectual Property Rights

One way to encourage copyright protection would be to support the development of intellectual property domestically.²⁵⁹ Already Chinese musicians are calling out for better copyright protection because they cannot earn a profit through music sales.²⁶⁰ Instead, they rely on live performances and endorsements to squeeze out a living.²⁶¹ They complain that the lack of copyright protection is stifling the domestic music industry and that society suffers because of the lack of music from Chinese musicians.²⁶² Because record companies must look to artist management rather than record sales to generate profits,²⁶³ the focus is on a select few acts that attract endorsement

²⁵⁶ FENG, *supra* note 253, at 19.

²⁵⁷ The purpose was to increase local autonomy in the effort to transition from a planned economy to a market economy. Jeffery W. Berkman, *Intellectual Property Rights in the PRC: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA PAC. BASIN L. J. 1, 17 (1996).

²⁵⁸ See *supra* note 81 and accompanying text.

²⁵⁹ See William P. Alford, *Making the World Safer for What? Intellectual Property Rights, Human Rights, and Foreign Economic Policy in the Post-European Cold War World*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE, *supra* note 13, at 148 (stating that the best rationale for intellectual property law in the PRC is the preservation of the welfare of the Chinese people).

²⁶⁰ Thomas Crampton, *Pop Stars Learn to Live with Pirates*, INT'L HERALD TRIBUNE, Feb. 24, 2003, at 1.

²⁶¹ *Id.*

²⁶² *Id.*; Benjamin Robertson, *Pirates Cripple China's Music Scene*, ALJAZEERA.NET, Jan. 15, 2004, at <http://english.aljazeera.net/NR/exeres/47931E25-DE57-432B-879E-79D8B655859D.htm> (last visited Jan. 14, 2005).

²⁶³ Crampton, *supra* note 260.

deals and large crowds,²⁶⁴ rather than on new acts and alternative genres of music. Demonstrating that piracy is harmful to the PRC's music culture will create a greater valuation of copyright protection in the PRC.

Moreover, as domestic intellectual property develops in the PRC and is marketed worldwide, the Chinese government will need a functioning copyright system to provide protection for Chinese works. A good example of the power of internal motivation is the protection given to the trademark for the 2008 Beijing Olympic Games. Officials vowed to spend the coming years defending the logo.²⁶⁵ The Beijing Olympic Committee formed a legal department in charge of protecting Olympic-related intellectual property rights²⁶⁶ and the city of Beijing issued regulations regarding the protection of Olympic intellectual property.²⁶⁷ Officials have been confiscating garments incorporating fake reproductions of the official logo, as well as items that infringe on preliminary versions of the logo.²⁶⁸ Selling infringing products carries a fine reaching up to approximately US\$ 6000.²⁶⁹ The existence of domestic intellectual property and the desire to protect it was the motivation for enforcing the trademarks.

Supporting the development of domestic copyrights will help to improve Chinese intellectual property rights protection. By forming joint ventures with Chinese companies, developing subsidiaries in the PRC, or investing in emerging industries, the recording industry can promote an internal need for copyright protection in China. This will help to harmonize the idea of copyright with the value placed on societal interests in the PRC, thereby making copyright protection more effective.

VI. CONCLUSION

As Internet use grows in the PRC, piracy will spread. The true problem is not the lack of adequate law. The PRC Copyright Law was enacted in the early 1990s and has been amended in accordance with the various international treaties governing intellectual property. The problem is that the underlying cultural and social support for the law is lacking.

²⁶⁴ Robertson, *supra* note 262.

²⁶⁵ *China Unveils Olympic Size Marketing Plan*, CBS.SPORTSLINE.COM, Sept. 1, 2003 (on file with author).

²⁶⁶ *Beijing Sets Up Department to Protect Olympics Logo*, XINHUA NEWS AGENCY, Dec. 27, 2001.

²⁶⁷ *Beijing Tackles Olympic Intellectual Property Rights Violations*, CHINA ONLINE, Jan 23, 2002; Beijing 2008; Regulations on the Protection of Olympic Symbols, April 1, 2003, at <http://en.beijing-2008.org/91/39/article211613991.shtml> (Jan. 14, 2005).

²⁶⁸ *Beijing Tackles Olympic Intellectual Property Rights Violations*, *supra* note 267; Beijing 2008, *supra* note 267.

²⁶⁹ Anthony, *supra* note 248.

Accordingly, efforts to enforce the law are minimal. Compelling the PRC to adopt Western-style copyright laws without first determining whether the necessary conditions for the laws' success exist leaves little chance that the laws will take root.

The best way for the recording industry to protect its interests in the PRC is to explore solutions that resonate with Chinese culture. While further amending the PRC Copyright Law and making changes that improve enforcement and prosecution are important, the best laws will be ineffective without an internal stimulus to support them. The recording industry should therefore encourage the development of domestic intellectual property, increase supervision of local copyright enforcement personnel, decrease the prices of legitimate goods to levels reasonable for Chinese consumers, and employ other culturally-sensitive solutions. By pursuing solutions that make copyright protection desirable to Chinese society, the recording industry will be able to prevent online music piracy in the PRC and access a market of 1.295 billion consumers.²⁷⁰

²⁷⁰ NATIONAL BUREAU OF STATISTICS PEOPLE'S REPUBLIC OF CHINA, MAJOR FIGURES OF THE 2000 POPULATION CENSUS (Mar. 28, 2001), at <http://www.cpirc.org.cn/en/e5cendata1.htm> (last visited Jan. 14, 2005).

